PERWIRA AFFIN BANK BERHAD

v.

TAN TIAN SER

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL AZIZ BIN MOHAMAD J
[ORIGINATING SUMMONS NO. S3-24-381-93]
30 NOVEMBER 1994

PRACTICE & PROCEDURE*: Application for order for sale pursuant to s. 256 of the NLC - Land charged to plaintiff as security for a term loan and overdraft facility - Defendant alleging non-compliance with O. 83 r. 3(2), (3) & (6) of the RHC 1980 - Whether O. 83 r. 3 applicable to a s. 256 application - Whether prayer for vacant possession of the property makes the application a type (d) charge action - Consideration of O. 83 r. 1(1)(a), (b) & (d) RHC and ss. 254, 255, 256(3) & 257(1)(c) NLC.*

This was an application pursuant to s. 256 of the National Land Code (NLC) for an order for sale of land which the defendant, the registered owner, had charged to the plaintiff as security for a term loan and an overdraft facility. In challenging the application, the defendant's Counsel submitted non-compliance of O. 83 r. 3(2) & (3) of the Rules of the High Court 1980 (RHC) in that, the affidavit in support did not exhibit the original charge and the copy exhibited was unclear, not certified as a true copy nor was "the charge certificate" produced at the hearing. Furthermore, the amount of the overdraft facility actually used had not been stated as required by subparagraph (a) of paragraph (3), and the interest in arrears on the term loan had not been stated as required by subparagraph (c). The correctness of the figures were not questioned.

The issue was whether O. 83 r. 3 was applicable to the present application.

Held:

[1] Order 83 applies to charge actions. Rule 3 only "applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of posession or payment of moneys secured by the charge or both". The types of charge action intended by that sentence are those falling under r. 1(1) (a) & (d). An application for an order for sale under s. 256 of the NLC is not an action in which there is a claim for a payment of moneys secured by the charge and therefore is not a type (a) charge action. The claim under s. 256 is for the sale of the charged property, which makes it a type (b) charge action, to which r. 3 does not apply.

[2] The treatment of an application for an order for sale must necessarily be different from that of an action for the payment of moneys secured by the charge becaused the conditions for the success of an application for an order for sale are subject to the NLC whereas the conditions for the success of an action for payment of moneys secured by the charge are not. In fact, by virtue of s. 256(3), the chargee, if his application shows the NLC pre-conditions for applying have been fulfilled, he is *prima facie* entitled to an order unless the existence of a cause to the contrary is shown. If the chargor thinks there is a cause to the contrary, it is up to him to satisfy the Court that it exists. If the correctness of the account is relevant, that question may be raised by the chargor at a stage subsequent to the chargee's making of his application, without the chargee having to show particulars of account at that time.

[3] The prayer for vacant possession is misconceived. The delivery of possession in a type (d) charge action is delivery to the chargee by the chargor or whoever is in possession of the property. That relief must relate to the remedy of possession of the chargee which is dealt with in Chapter 4 (ss. 270 to 277), Part 16 of the NLC. The remedy of possession is an alternative to the remedy of sale, which is dealt with in Chapter 3 (ss. 253 to 269), or *vice versa*. One cannot have vacant possession and sell, or sell and have possession at the same time. Since the plaintiff is seeking the remedy of sale, it cannot also be seeking the remedy of possession.

Obiter Dictum:

It often happens that points about correctness of account that are raised by the chargor are not actually relevant to the question of "cause to the contrary" but rather to the question of specifying in the order for sale the correct total amount due to the chargee at the date on which the order is made, as required by s. 257(1)(c). What is required for the purposes of that paragraph would be an affidavit filed before the date on which the order is expected to be made and stating what would be the amount due on that future date. If no order is given on that date and is expected to be given on a subsequent date, another such affidavit is put in before the subsequent date stating the amount that would be due on that date. The need for an affidavit as to the amount due to be put in every time that a hearing of an application for an order for sale is postponed is due solely to the requirement of s. 257(1)(c).

The Court has noticed that these periodic affidavits have tried to be faithful to the requirement of r. 3(3) as to the giving of the particulars specified therein, with the particulars modified so as to show also the amount due on the expected date of the order. But those particulars are not meant to fulfil the needs of s. 257(1)(c). Those particulars are to be given only once, that is - as stated in r. 3(1) - in the affidavit in support of the originating summons by which the action to which the rule applies is begun. Furthermore, the particulars specified do not reflect the needs of s. 257(1)(c) because there is no requirement as to stating the total amount due at the date on which the order for sale is to be made. In fact it would be impossible to lay down that requirement in r. 3 as it would be referring to an order for sale in a provision which, as expressly stated, applies only to claims for delivery of possession and payment of moneys secured by the charge.

[Application allowed].

Cases referred to:
Kandiah Peter a/l Kandiah v. Public Bank Berhad [1993] 2 AMR 49 3464 ***(foll)***
Citibank NA v. Ibrahim bin Othman [1994] 1 MLJ 608 ***(dist)***
Malayan Banking Berhad v. Dagang Bina Sdn. Bhd. [1991] 3 CLJ 1739 ***(dist)***

Legislation referred to:
National Land Code, ss. 253, 254, 255, 256, 257(1) & 269
Rules of the High Court 1980, O. 83, rr. 1(3), 3, para. (2), (3)(a), (b), (c) & (d) & (6)

For the plaintiff - Mohd. Asri; M/s. Sofian Syed Ahmad & Co.
For the defendant - Kerk Boon Ling; M/s. Lim Soh Wah & Partners

JUDGMENT

Abdul Aziz bin Mohamad J:

This is an application, by way of originating summons, under s. 256 of the National Land Code for an order for sale of a land, of which the defendant is the registered owner and which has been charged by him to the plaintiff to secure repayment, with interest, of a term

loan of RM205,000 and an overdraft of RM52,000 granted by the plaintiff to the defendant. The originating summons was issued on 4 May 1993. The affidavit in support of this application, dated 21 April 1993, states that, as at 31 March 1993, the amount due and payable in respect of the term loan was RM250,753.53 and that in respect of the overdraft was RM66,567.93.

As cause against the making of the order for sale, learned Counsel for the defendant, in his submission, relied only on the failure of the affidavit in support of this application to comply with paras. (2) and (3) of r. 3 of O. 83 of the Rules of the High Court 1980.

Paragraph (2) of that rule says:

> (2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

In this case the affidavit did not exhibit the original charge and the copy exhibited was not clear and not certified as a true copy. Nor was "the charge certificate" produced at the hearing.

Paragraph (3) of that rule says:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.

By para. (6), the particulars mentioned in para.(3) - that is, in subparagraphs (a) to (d) - must also be given where a plaintiff claims payment of moneys secured by a charge.

The instances mentioned by learned Counsel for the defendant of non-compliance of the affidavit with para. (3) were that the amount of the overdraft facility actually used had not been stated, as required by subparagraph (a) of para. (3), and that the interest in arrears on the overdraft and the instalments in arrears on the term loan had not been stated, as required by subparagraph (c).

Learned Counsel for the defendant did not, however, question the correctness of the figures in the affidavit in support of this application or in any of the subsequent affidavits of the plaintiff.

In my opinion paras. (2), (3) and (6) do not apply to this application and therefore do not have to be complied with by the affidavit in its support. My reasons follow.

Order 83 applies to charge actions. By para. (1), read together with para. (3), of r. 1, a charge action is:

> ....any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely:
>
> (a) payment of moneys secured by a charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

By the second sentence of para. (1) of r. 3, r. 3 only "applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both". The types of charge action intended by that sentence are those falling under subparagraphs (d) and (a) of para. (1) of r. 1. So para. (2) of r. 3 applies only to those two types of charge action. Paragraph (3) of r. 3 is expressed to be applicable to a case where the plaintiff claims delivery of possession and, by para. (6), applies also to a case where the plaintiff claims payment of moneys secured by the charge. So the types of charge action to which para. (3) applies are also those falling under subparagraphs (d) and (a) of para. (1) of r. 1.

An application for an order for sale under s. 256 of the National Land Code, as the application in this case is, is not an action in which there is a claim for payment of moneys secured by the charge and therefore is not a type (a) charge action. The claim under s. 256 is for the sale of the charged property, which makes it a type (b) charge action, to which r. 3 does not apply. If the Rules Committee had intended that r. 3 should apply to the type of charge action in which there is a claim for the sale of the charged property, that is the type (b) charge action, they would, after expressly including that type in r. 1, have included a mention of it in r. 3, but there they have made mention only of types (a) and (d) charge actions.

It may be thought that where a chargee applies for an order for sale under the National Land Code he is in effect bringing an action in which there is a claim for payment of moneys secured by the charge, that is a type (a) charge action, because the purpose of the sale is to get in moneys from the charged property in or towards settlement of the debt secured by the charge. But such an interpretation would be one that is contrived and that ignores the plain meaning of the words ".... a claim for ... (a) payment of moneys secured by the charge" in para. (1) of r. 1. The plain fact is that where the amount secured by a charge is now, say, RM500,000 and the chargee applies for an order for sale of the security, he is not asking the Court to order the chargor to pay him that amount. He is, as the Supreme Court said in *Kandiah Peter a/l Kandiah v. Public Bank Berhad* [1993] 2 AMR 49 3464, not suing for a debt. He is merely asking that the security that he holds be sold. The sale might bring in for the chargee only RM300,000. There would still be another RM200,000 owing, which the debtor is yet to be ordered to pay to the chargee.

Moreover, if the Rules Committee had intended the type (a) charge action to include or also mean a charge action where the chargee seeks the remedy of a sale of the charged property, which is what an application under s. 256 of the National Land Code is, they would not have needed to itemize expressly and separately the type (b) charge action in para. (1) of r. 1.

I think the type (a) charge action should be construed as being confined to what it is plainly described as, namely "... an action in which there is a claim for ... (a) payment of moneys

secured by the charge", for which, I might add in passing, para. (6) of r. 3 requires that the plaintiff must prove that the moneys are due and payable.

The question of the application of r. 3 of O. 83 to an application for an order for sale under s. 256 of the National Land Code was raised in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608, where Mahadev Shankar J, at pp. 612 and 613, after agreeing with Abdul Razak J in *Malayan Banking Berhad lwn. Dagang Bina Sdn. Bhd.* [1991] 3 CLJ 1739, and expressing his opinion on the meaning of "foreclosure", concluded:

> Citibank here applied for an order of sale in order to effect payment of moneys secured by the charge. Reading O. 83 rr. 1(1)(a), (b), (c), 3(3) and 3(6) together. I think it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit.

It would appear that he considered that an application for an order for sale is in effect a claim for payment of moneys secured by the charge, as to which I have already given my reasons for thinking otherwise.

Abdul Razak J, at p. 1740 of the above-mentioned case, had this to say:

> Saya berpendapat sebaliknya plaintiff adalah terbabit kepada k. 3(3). Mungkin tindakan menjual adalah satu remedi yang berasingan, seperti mana k. 1(1)(a) itu mendedahkan, tetapi tidak dapat dielakkan, dengan secara langsung atau tidak langsung, tindakan memohon wang yang dihutang itu dibayar adalah juga tindakan yang ternyata mesti dilakukan terlebih dahulu, sebelum tanah cagaran itu boleh dijual. Oleh itu, sungguhpun k. 3(1) itu tidak menyebut ianya sebagai prosedur yang membabitkan penjualan tanah cagaran, pengertiannya tidak dapat tidak mestilah begitu, jika tidak keadaannya yang agak ganjil dan bercanggah akan berlaku, di mana apabila permohonan untuk mendapatkan wang yang dijamin oleh cagaran itu memerlukan kira-kiranya itu ditunjukkan, tetapi apabila harta yang dicagar itu hendak dijual, kira-kira itu tidak diperlukan walhal, apabila tanah itu hendak dijual kira-kira itu lebih-lebih lagi dipentingkan. Bahkan kedua-dua remedi itu berkait, kerana, sebelum ia boleh dijual, perlu dipastikan wang yang dihutang itu belum dan tidak dibayar; tafsiran ini adalah sejajar dengan peruntukan di bawah s. 257 Kanun Tanah Negara yang mensyaratkan bahawa sebelum Mahkamah membuat perintah menjual, ia hendaklah menentukan jumlah wang yang dihutang, dan s. 256 menyatakan prosedurnya adalah mengikut prosedur sivil di Mahkamah yang tidak dapat tidak bermakna kk. 83 itu sendiri. Kalau Mahkamah tidak dilengkapkan dengan prosedur menjual bagaimanakah tindakan itu boleh dilakukan, jika Kanun Tanah Negara itu sendiri tidak mempunyai prosedur itu.

It does not appear that the reason he considered para. (3) of r. 3 to be applicable to an application for an order for sale was because such an application is in effect an application for payment of moneys secured by the charge. His reason appears to be based on considerations of consistency of treatment. He thought that if a claim for payment of moneys secured by the charge must show the state of the account between the chargor and the chargee, there was greater need for it to be shown where the land charged is to be sold.

But the treatment of an application for an order for sale must necessarily be different from that of an action for payment of moneys secured by the charge because the conditions for the success of an application for an order for sale are subject to the National Land Code whereas the conditions for the success of an action for payment of moneys secured by the charge are not. Under s. 254 of the National Land Code, for a chargee to be entitled to apply for an order for sale, there must have been a breach by the chargor of any of his obligations under the charge for the prescribed period, followed by a notice in Form D specifying the breach and requiring it to be remedied within the prescribed period and warning that the chargee will take proceedings to obtain an order for sale if the notice is not complied with, and there must have been a failure to remedy the breach at the expiry of the period. If all

a those requirements are met, the chargee is entitled to apply for an order for sale. Therefore his application need only prove those conditions. Under s. 255, to be entitled to apply for an order for sale, the chargee need only show that the principal sum secured by the charge is payable on demand, that there has been a demand in Form 16E, and there has been a failure to pay within the prescribed period. Under those sections there would be no necessity for the chargee, to qualify him to apply for an order for sale, to show the state of the account b between the chargor and the chargee by giving the particulars specified in para. (3) of r. 3. In fact, by virtue of subsection (3) of s. 256, the chargee, if his application shows the National Land Code preconditions for applying have been fulfilled, he is *prima facie* entitled to an order unless the existence of a cause to the contrary is shown. If the chargor thinks there exists a cause to the contrary, it is up to him to satisfy the Court that it exists. If the correctness of the state of the account between him and the chargee is relevant to the cause, c he may question the correctness of the account, giving his reasons, and the chargee may in reply try to defend the correctness of the account. So if the correctness of the account is relevant to determining whether in law there is cause against the making of an order for sale, that question may be raised by the chargor at a stage subsequent to the chargee's making of his application, without the chargee having to show particulars of the state of the account at the time that he makes his application. I might remark that it often happens that points d about correctness of account that are raised by the chargor are not actually relevant to the question of "cause to the contrary" but rather to the question of specifying in the order for sale the correct total amount due to the chargee at the date on which the order is made, as required by para. (c) of subsection (1) of s. 257. In those cases the breaches or defaults may be clear, no positive attempt may have been made to show that the chargor has not defaulted or been in breach, yet an attempt is made to question the correctness of the account between e the chargor and the chargee.

While on the subject of the requirement of para. (c) of subsection (1) of s. 257, I would like to make the following observations.

What is required for the purposes of that paragraph would be an affidavit filed before the date on which the order is expected to be made and stating what would be the amount due f on that future date. If no order is given on that date and is expected to be given on a subsequent date, another such affidavit is put in before the subsequent date stating the amount that would be due on that date. The need for an affidavit as to the amount due to be put in every time that a hearing of an application for an order for sale is postponed is due solely to the requirement of para. (c) of subsection (1) of s. 257.

I have noticed that these periodic affidavits for the purposes of para. (c) of subsection (1) g of s. 257 have tried to be faithful to the requirement of para. (3) of r. 3 as to the giving of the particulars specified therein, with the particulars modified so as to show also the amount due on the expected date of the order, and have sometimes been referred to as the affidavit in compliance with para. (3) of r. 3 of O. 83. But I think those particulars are not meant to fulfil the needs of para. (c) of subsection (1) of s. 257. Those particulars are to be given only once, that is - as stated in para. (1) of r. 3 - in the affidavit in support of the originating h summons by which the action to which the rule applies is begun. Furthermore the particulars specified do not reflect the needs of para. (c) of subsection (1) of s. 257 because there is no requirement as to stating the total amount due at the date on which the order for sale is to be made. In fact it would be impossible to lay down that requirement in r. 3 as it would be referring to an order for sale in a provision which, as expressly stated, applies only to claims for delivery of possession and payment of moneys secured by the charge. i

One of the ancillary prayers in this application, that is the sixth prayer, is "bahawa defendan hendaklah memberikan milikan kosong tanah tersebut dalam tempoh tujuh (7) hari selepas jualan tanah ini". The question is whether that prayer makes this application a type (d) charge action, that is to say "an action in which there is a claim for ... (d) delivery of possession ...", to which r. 3 would apply. I do not think so, because I think the prayer is misconceived. The delivery of possession in the type (d) charge action is delivery of possession to the chargee by the chargor or whoever else is in possession of the property. That relief must relate to the remedy of possession of the chargee which is dealt with in Chapter 4 (comprising ss. 270 to 277) of Part Sixteen of the National Land Code. The remedy of possession is an alternative to the remedy of sale, which is dealt with in Chapter 3 (comprising ss. 253 to 269), or *vice versa*. The chargee who wants a sale cannot be wanting possession. One cannot have possession and sell, or sell and have possession, at the same time. Since in this case the plaintiff is seeking the remedy of sale, it cannot be that it also is seeking the remedy of possession. I should add in passing that the affidavit in support of the originating summons by which a chargee begins a type (d) charge action must, by para. (4) of r. 3, "give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property", but no such particulars have been given in the affidavit in support of this application.

It may be argued that the vacant possession intended by the sixth prayer is not vacant possession to the chargee but to the buyer. If that be the case, the relief sought is not included in r. 1 of O. 83, and the question does not arise at all whether that prayer makes this application a charge action to which O. 83, particularly r. 3, applies.

As, for cause against the making of an order for sale, the defendant relies only on non-compliance of the affidavit in support of this application with paras. (2), (3) and (6) of r. 3, and as, in my opinion, r. 3 does not apply to this application, the defendant must fail in his opposition to the making of an order for sale and I must make the order.